A

Svalbard Holdings Ltd v Khoo Boon Gui

B HIGH COURT (PENANG) — SUIT NO PA-22NCC-85–12 OF 2024
QUAY CHEW SOON J
5 MARCH 2025

C *Civil Procedure — Writ of summons — Setting aside — Plaintiff ('P') and defendant ('D') were parties to agreement that required disputes between them to be adjudicated by New York Court in USA and provided that rights and obligations of parties were to be governed by New York State laws — P filed suit based on agreement against D in Malaysian High Court — Whether D was entitled to have writ set aside under O 12 r 10(1) of Rules of High Court 2012 because of the* D *exclusive jurisdiction clause as well as forum non conveniens — Whether although High Court had jurisdiction over D as Malaysian citizen residing in Penang, the New York Court was the more appropriate forum to adjudicate the dispute — Whether exclusive jurisdiction clause should be given effect to unless P could show exceptional circumstances why it was not bound by that clause*

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As part of its investment strategy, the plaintiff ('P'), a foreign company, sought to buy over the claims of creditors of one FTX Trading Ltd ('FTX') that had gone into liquidation in the United States of America ('US'). P's case against the defendant ('D') was that P had transferred USD3,322,002.92 ('the F purchase price') to D pursuant to an agreement to buy over what P thought were substantial claims that D had against FTX but which later proved to be of insignificant value. D was at all material times a Malaysian citizen resident in Penang. P filed the instant suit seeking various reliefs against D premised on fraudulent misrepresentation, constructive trust, unjust enrichment and G breach of contract. Simultaneous with the filing of the suit, P applied for injunctive relief vide encl 3 and pending the determination of encl 3, P was granted an ad interim order restraining D from dealing with the purchase price. On being served with the writ and statement of claim, D applied vide encl 17 to set aside P's suit and all orders made thereunder pursuant to O 12 r 10(1) of the H Rules of Court 2012 ('the ROC') and/or the inherent jurisdiction of the court on the ground that the courts in Malaysia were not the appropriate forum to adjudicate the dispute between the parties. The grounds for encl 17 were that cl 32 of the agreement between the parties expressly provided that the rights and obligations of the parties were to be governed by the laws of the US and/or I the laws of the State of New York and that all disputes relating to the agreement were to be adjudicated either in a federal district court or state court or federal bankruptcy court in New York.

Held, allowing the encl 17 and setting aside the plaintiff's action:

(1) As D was a Malaysian citizen and resident in Penang, the court had jurisdiction to hear the instant suit by virtue of s 23(1)(b) of the Courts of Judicature Act 1964. However, because of the exclusive jurisdiction cl 32 in the agreement and on the ground of forum non conveniens, the courts in Malaysia should not hear the instant suit. The facts of the case showed that the US courts in New York were the more appropriate forum to adjudicate the dispute between the parties as the subject-matter of the suit was closely tied to US law and legal requirements (see paras 19, 29, 44 & 54).

(2) Although the exclusive jurisdiction cl 32 did not necessarily oust the jurisdiction of the court, nevertheless the court was obliged to give effect to that clause so as not to condone a breach of the agreement by P, which had not shown any exceptional circumstance to justify why it was not bound by the exclusive jurisdiction clause (see paras 24 & 29).

(3) D was entitled to dispute the court's jurisdiction to hear the instant suit based on the exclusive jurisdiction cl 32 in the agreement as well as because of forum non conveniens as these two grounds could constitute 'any other ground' in r 10(1) of O 12 of the ROC. There was no reason why the relief of setting aside under r 10(1) could not be granted in the present case (see paras 55–56).

(4) P's objection that encl 17 was filed after the time limited for serving of the defence had expired (see O 12 r 10(1) of the ROC) could not be sustained as the court had allowed D an extension of time until 16 January 2025 to file the defence, whereas encl 17 was filed a day earlier, on the 15th. This was sufficient compliance with r 10(1). D did not have to separately obtain an extension of time to file encl 17 (see paras 64–65 & 68–69).

(5) The ad interim order dated 4 December 2024 was ancillary to the existence of a substantive action and could no longer continue with the setting aside of P's suit. As such the ad interim order was set aside and encl 3, which was pending determination, was dismissed (see para 72).

[Bahasa Malaysia summary

Sebagai sebahagian daripada strategi pelaburannya, plaintif ('P') yang merupakan sebuah syarikat asing, cuba untuk membeli tuntutan pemiutang-pemiutang FTX Trading Ltd ('FTX') yang telah dibubarkan di Amerika Syarikat ('AS'). Kes P terhadap defendan ('D') adalah bahawa P telah memindahkan USD3,322,002.92 ('harga belian') kepada D menurut perjanjian untuk membeli tuntutan besar yang dimiliki D terhadap FTX tetapi kemudiannya terbukti tidak mempunyai nilai yang lumayan. D pada setiap masa material adalah warganegara Malaysia yang menetap di Pulau Pinang. P memfailkan saman ini untuk mendapatkan pelbagai relif terhadap D berdasarkan salah nyata penipuan, kepercayaan berterusan, pengkayaan yang tidak adil dan pelanggaran kontrak. Serentak dengan pemfailan saman

itu, P memohon relif injunksi melalui lampiran 3 dan sementara menunggu penentuan lampiran 3, permohonan P untuk perintah ad interim yang menghalang D daripada berurusan dengan harga pembelian telah dibenarkan. Setelah writ dan pernyataan tuntutan diserahkan, D memohon melalui lampiran 17 untuk mengenepikan saman P dan semua perintah yang dibuat di bawahnya menurut A 12 k 10(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau bidang kuasa yang wujud di mahkamah atas alasan bahawa mahkamah di Malaysia bukanlah forum yang sesuai untuk mengadili pertikaian antara pihak-pihak. Alasan untuk lampiran 17 adalah bahawa klausa 32 perjanjian antara pihak-pihak dengan jelas memperuntukkan bahawa hak dan kewajipan pihak-pihak akan ditadbir oleh undang-undang AS dan/atau undang-undang negeri New York dan bahawa semua pertikaian yang berkaitan dengan perjanjian itu akan diadili sama ada di mahkamah daerah persekutuan atau mahkamah negeri atau mahkamah kebankrapan persekutuan di New York.

Diputuskan, membenarkan lampiran 17 dan mengenepikan tindakan P:

(1) Memandangkan D adalah warganegara Malaysia dan bermastautin di Pulau Pinang, Mahkamah ini mempunyai bidang kuasa untuk mendengar saman ini berdasarkan s 23(1)(b) Akta Mahkamah Kehakiman 1964. Walau bagaimanapun, terdapat bidang kuasa eksklusif klausa 32 dalam perjanjian tersebut dan atas alasan forum non conveniens, mahkamah di Malaysia tidak boleh mendengar saman ini. Fakta-fakta kes itu menunjukkan bahawa mahkamah AS di New York adalah forum yang lebih sesuai untuk mengadili pertikaian antara pihak-pihak kerana perkara saman itu berkait rapat dengan undang-undang AS dan keperluan undang-undangnya (lihat perenggan 19, 29, 44 & 54).

(2) Walaupun bidang kuasa eksklusif di klausa 32 tidak semestinya menghapuskan bidang kuasa mahkamah ini, namun mahkamah seharusnya memberi kesan kepada klausa itu supaya tidak membenarkan pelanggaran perjanjian oleh P yang tidak menunjukkan sebarang keadaan luar biasa untuk tidak terikat dengan klausa bidang kuasa eksklusif (lihat perenggan 24 & 29).

(3) D berhak untuk mempertikaikan bidang kuasa mahkamah ini untuk mendengar saman ini berdasarkan bidang kuasa eksklusif di klausa 32 dalam perjanjian tersebut dan juga kerana forum non conveniens kerana kedua-dua alasan ini boleh membentuk 'apa-apa alasan lain' dalam A 12 k 10(1) KKM. Tiada sebab untuk relif mengenepikan kes di bawah k 10(1) tidak boleh diberikan dalam kes ini (lihat perenggan 55–56).

(4) Bantahan P bahawa lampiran 17 telah difailkan selepas had masa untuk menyerahkan pembelaan telah tamat (lihat A 12 k 10(1) KKM) tidak dapat dipertahankan kerana mahkamah telah membenarkan D lanjutan

masa sehingga 16 Januari 2025 untuk memfailkan pembelaan, manakala lampiran 17 telah difailkan sehari sebelumnya iaitu pada 15hb. Terdapat pematuhan terhadap k 10(1). D tidak perlu mendapatkan lanjutan masa secara berasingan untuk memfailkan lampiran 17 (lihat perenggan 64–65 & 68–69).

(5) Perintah ad interim bertarikh 4 Disember 2024 adalah sampingan kepada tindakan substantif dan tidak lagi boleh diteruskan disebabkan saman P telah diketepikan. Oleh itu, perintah ad interim diketepikan dan lampiran 3 yang belum selesai juga ditolak (lihat perenggan 72).]

Cases referred to

Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd [2024] 2 MLJ 471; [2024] 3 MLRA 152; [2024] 4 CLJ 243, CA (folld)

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160, SC (refd)

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad [1976] 2 MLJ 154, FC (refd)

Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424; [2004] 1 CLJ 810, CA (refd)

Open Country Dairy Ltd v Able Food Sdn Bhd [2021] MLJU 969; [2021] 7 CLJ 716, CA (refd)

Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor [2014] 6 MLJ 189, FC (distd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (refd)

Teng Ah Kiong v Lam Chee Seong [2024] MLJU 1366; [2024] CLJU 1326, HC (refd)

The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria [1969] 2 All ER 641 (refd)

World Triathlon Corp v SRS Sports Centre Sdn Bhd [2019] 4 MLJ 394; [2019] 1 CLJ 381, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 23(1), (1)(b)
Evidence Act 1950 ss 38, 45(1), 101, 102, 103
Rules of Court 2012 O 3 r 5, O 12 r 10, 10(1), (1)(a), (1)(g), (1)(f), (1)(h), (2), (4), O 18 r 2, O 19

Lee Shih (with Charmaine Choong Suet Yin and Sachin Nair) (Lim Chee Wee Partnership) for the plaintiff.
Lee Kean Wooi (with Ang Xin Lin) (Lee Kean Wooi & Co) for the defendant.

Quay Chew Soon J:

INTRODUCTION

[1] The defendant ('D') filed an application dated 15 January 2025 vide encl 17 to set aside the plaintiff's ('P') action. Enclosure 17 is made under O 12 r 10 of the Rules of Court 2012 and the inherent jurisdiction of the court. On 27 February 2025, I allowed encl 17. Here are the grounds of my decision.

BACKGROUND FACTS

[2] P is a Cayman incorporated entity. It is a wholly owned subsidiary of the Attestor Group. The Attestor Group operates as an alternative investment management company, investing in long-term and patient capital in global opportunities. This included purchasing claims from the creditors of FTX Trading Ltd ('FTX'), following the latter's bankruptcy. D is one such creditor of FTX.

[3] The instant suit arises against the backdrop of the United States (US) Chapter 11 bankruptcy of FTX in November 2022, amid allegations of fraud and embezzlement relating to customer funds. Prior to that, FTX was one of the largest and leading global digital cryptocurrency exchange platforms.

THE PLAINTIFF'S CASE

[4] P's case is this.

(a) the Attestor Group had sought to acquire the claims in respect of FTX ('FTX claims') from the latter's creditors as part of its investment strategy. D had represented to P that he was one such claimholder;

(b) between November 2022 to February 2023, D represented to P that he was in control of an FTX account linked with claims of approximately USD31m in value. P was fraudulently induced to purchase D's FTX claims, which D falsely represented to P as being valid claims against FTX (following its bankruptcy in November 2022). Based on the representations made by D, P entered into an agreement with him for the purchase of his FTX claims;

(c) the parties originally entered into an agreement dated 8 March 2023 for the sale by D of his FTX claims to P. Subsequently, the parties entered into an agreement dated 20 March 2023 ('agreement'), which superseded the original agreement. The terms contained in the agreement are similar to the terms contained in the original agreement, save that the purchase price of D's FTX claims was increased from USD3,163,812.31 to USD3,322,002.92;

(d) in consideration for the purchase, P transferred 3,322,002.92 USDT tokens (equivalent to USD3,322,002.92 at the material time) to D's wallet. This amount represented approximately 10.5% of the USD31m value of D's FTX claims; and

(e) P later discovered that the FTX claims did not belong D, but instead belong to a different FTX account holder. The total value of D's actual claim in respect of his FTX account was only approximately USD39. P says that it was first notified of this by the debtors of FTX in the middle of October 2023. It subsequently conducted its own investigation to confirm this.

THE DEFENDANT'S CASE

[5] D's case is this.

(a) P's unilateral assessment of the value of the FTX claims does not provide a valid foundation for alleging a breach of agreement. The value of the FTX claims was always speculative and subject to risks, which P understood when entering into the agreement;

(b) D himself could not be certain of the value of the FTX claims due to the FTX system crash at that time. This information was communicated to P, who had full knowledge and chose to proceed with the deal nonetheless;

(c) P's allegation of discovering the FTX claims actual debt paper value to be USD39, as opposed to the purported value of USD31m, is based solely on its self-speculation through the so called own self investigation. This self-investigation has not been verified. Nor has any credible evidence been provided to substantiate such a claim, as all the documents shown was dubious;

(d) P referred to a list of top 50 creditors (under Chapter 11, CaseNo 22–11068 *JDT) in the US bankruptcy court for the District of Delaware. Which indicates D being at position '# 30' on the list. But the debtor (FTX) had stated that the list is not conclusive. So where the US bankruptcy court and FTX are unable to ascertain accurate details, it is unreasonable for P to rely on this incomplete list to support the alleged fraud claim;

(e) moreover, the purported value of USD39 in the FTX claims was never part of the agreed upon accounts in the agreement between the parties. Those accounts were not addressed or referenced during the verification process, including the KYC (know your customer/client) and due diligence conducted by P;

(f) D denies that he fraudulently induced P into the agreement to purchase

A the FTX claims. P, being an experienced trading company, had the resources and professional team to conduct due diligence prior to the purchase from D; and

(g) it is premature for P to assert claims of fraudulent misrepresentation, constructive trust, unjust enrichment or breach of contract. As the gist of the agreement, ie the FTX claims, is still pending determination in the US bankruptcy court.

[6] In furtherance of his case, D asserts that P knew the risks and the nature of their dealings. P cannot now turn around to allege fraudulent misrepresentation on the part of D. The following discussions between the parties are referred to:

(a) the chat log below shows that D was transparent about the issues surrounding the FTX platform and the challenges it faced. There was no fraudulent intent:

> 24/11/2022, 17:45 — Milo Khoo: This was a *screenshot just a week before FTX go collapse, sadly didn't manage to pull more info when they die and FTX website is completely dead now* lol
>
> 24/11 /2022, 17:45 — Milo Khoo: Yes in the USD, some USDT
>
> 24/11/2022, 17:45 — Khing: Yes crazy
>
> 24/11/2022, 17:46 — Milo Khoo: It's crazy that *they block me since July due to KYC process*
>
> 24/11/2022, 17:46 — Milo Khoo: So they been insolvent lol
> 24/11/2022, 17:46 — Milo Khoo: 🥲
>
> 24/11/2022, 17:47 — Khing: Yes insane
>
> 24/11/2022, 17:47 — Khing: Let me *get back to you with an offer* asap

(b) the message below shows that D communicated potential mismatch in the records, which was acknowledged by P without protest:

> 28/11/2022, 18:49 — Milo Khoo: > - History of withdrawals or payments into the account for at least prior 90 days
>
> *Wondering what can I provide,* most of my transaction was internal transfer of FTX, I can probably try to dig some history from other exchanges where I made my first few deposit into FTX; You need TX in blockchain right?
>
> 28/11/2022, 18:51 — Khing: *Yes that history would work — blockchain ideal, but if not statements can work too. Basically we just need to be able to verify/see how the balance came into existence*
>
> 28/11/2022, 18:52 — Milo Khoo: *Can't even remember which address belongs to FTX looking at my history now due to FTX sub-account feature* lol. But ya that's something I'll have to work out then

28/11/2022, 18:54 — Khing: Yes. *We know these things can be a bit messy, that's just the way it is*

28/11/2022,18:58 — Milo Khoo: Okay I think the *most challenging part is the history part which I'll have to figure out if decided to transact* — and the rest is just documents — I might want to take a *look at your terms sheet and go through your conditions* in details as well

28/11/2022, 19:07 — Khing: Yes sure

(c) P acknowledged D's explanation about the difficulty in verifying the FTX claims and accepted that there may be issues, which further undermines the fraud allegation. The chat below shows that D proactively addressed potential issues in verifying the FTX claims with P, demonstrating that there was no fraudulent intent:

29/11/2022, 18:07 — Milo Khoo: I'm *collecting my deposit info* — I'll *provide as much data as possible,* mostly deposit made from Bitfinex and Binance sometime ago

29/11 /2022,18:07 — Milo Khoo: I *won't be able to match the full amount for sure* as most are trade profit in the platform — and *internal transfer record is not available anymore,* but we'll see

29/11/2022, 18:08 — Khing: Great. Also probably worth taking a look at the *proof of claim form:* https://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0

29/11/2022, 18:08 — Khing: You don't have to fill it out straight away, but good to know what they ask for

29/11/2022, 18:09 — Milo Khoo: Cool thanks

29/11/2022, 18:10 — Milo Khoo: No one like losing money, My mentor always tell me — do not hate money

29/11/2022, 18:11 — Khing: Very valuable advice :)

29/11/2022,18:17 — Milo Khoo: For deposit info — I could provide a few TX like this one: https://etherscan.io/address/0x59848fc10551523904290a16e0dd0743bc4e2502

I'm *still collecting info, very hard to identity which is my account* now looking at my Binance and Bitfinex record lol

29/11/2022, 18:18 — Milo Khoo: Have to poke one by one

29/11/2022,18:21 — Khing: *Yeah can imagine*. Think about it this way — mainly we need to understand (1) where the money came from and (2) how many withdrawals you made in the 90 days prior to the filing — this relates to the clawback risk (can explain what that is)

(d) the conversation below shows that D proactively addressed potential issues in verifying the FTX claims with P, underscoring that there was no fraudulent intent which was acknowledged by P:

02/02/2023, 03:39 — Milo Khoo: I have talked to a few distressed buyer the past few weeks. *Trying to see if there's way to verify my balance, but seems like no one is able to find way for it,* I'm not sure how the claim you bought at December able to get Sullivan & Cromwell to reconcile with them lol

02/02/2023, 03:48 — Milo Khoo: Are they top 50 if you don't mind disclosing?

02/02/2023, 03:53 — Khing: 507 doesn't have its own capital. It's a broker. Tom showed me a '30mm claim' already, I *hadn't realised it was yours* haha

[7] D points out that section 12 of the agreement allows flexibility in the event the US bankruptcy court disallows, avoids or reduces all or any portion of the FTX claims. In such event, D must make a restitution payment to P corresponding to the amount of the disallowed FTX claims. But even in such an instance where all or any portion of the FTX claims is disallowed, it does not amount to a breach of contract on the part of D.

[8] Section 12 of the agreement reads:

> If, (a) pursuant to a final order of the Bankruptcy Court or such other court of competent jurisdiction, *all or any portion of the Transferred Claims is disallowed, avoided, reduced in the admitted amount as compared to the Transferred Claims Amount* ...(b) an order is entered in the Bankruptcy Court disapproving the transfer of all or any part of the Transferred Claims, ... or (d) if *all or any part of the Transferred Claims or other Transferred Right is avoided, disallowed, subordinated, reduced, or otherwise impaired,* for any reason whatsoever including, without limitation, by claims arising under chapter 5 of the Bankruptcy Code or any other similar statutes, or by a material breach by Seller of any of the terms, conditions, representations, or warranties of this Agreement (each such event, a 'Disallowance') then ... Seller shall pay to Buyer ... the 'Restitution Payment' ...

[9] D avers that the agreement was designed to accommodate the unpredictable nature of the FTX claims process and the legal complexities that can arise, particularly in a bankruptcy context. The parties accepted such uncertainty, recognising that different outcomes of the FTX claims could arise. Given the flexibility built into the agreement, D's actions do not amount to fraud. P's allegations of fraud are unfounded, as D's difficulties is consistent with the provisions and expectations outlined or anticipated in the agreement.

[10] D maintains that he had communicated the potential challenges with verifying the FTX claims and the missing records, which was acknowledged by P at the material time. There was no fraudulent intent or misrepresentation. P's dissatisfaction with the outcome of the FTX claims process, particularly with the uncertainty, cannot be equated with fraud.

THE EXCLUSIVE JURISDICTION CLAUSE

[11] The agreement was prepared by P and then forwarded to D for execution. It contains an exclusive jurisdiction provision in section 32 thereof ('exclusive jurisdiction cl 32'). Which stipulates that the parties agreed to New York, US court jurisdiction and New York, US governing law. Further, that the parties waive the defence of convenience of forum.

[12] The exclusive jurisdiction cl 32 reads:

> 32. Each of the Seller's and Buyer's rights and obligations hereunder shall be *governed by* and interpreted and determined in accordance with the *laws of the State of New York* (without regard to any conflict of laws provision that would require the application of the law of any other jurisdiction). *Any and all disputes* arising out of or otherwise relating to this Agreement shall be *adjudicated in* either a *federal district court or a state court, in each case, in the State of New York,* or a *federal bankruptcy court in the Southern District of New York,* and Seller and Buyer each *waive any objection with respect to the laying of venue of or defense of convenience of forum* with respect to such courts.

ENCLOSURE 17

[13] Premised on the exclusive jurisdiction cl 32, D applies to set aside the instant suit. Vide encl 17, D seeks the following reliefs:

(a) a declaration that Malaysia is *not the appropriate forum* for the claims and matters related to the plaintiff's claims in this action;

(b) that the writ, and/or the service of the writ, and statement of claim each dated 3 December 2024 against the defendant and any orders against the defendant be *set aside* in pursuant to O 12 r 10(1)(a) and/or (g) and/or (f) and/or (h) of the Rules of Court 2012;

(c) alternatively, that the writ and/or the service of the writ and statement of claim and the plaintiff's claim against the defendant be *set aside* under the *inherent jurisdiction* of this honorable court;

(d) that the ad interim order dated 4 December 2024 concerning the order obtained by the plaintiff against the defendant be set aside; and

(e) that the action filed by the plaintiff against the defendant be dismissed/*set aside* appropriately.

[14] The grounds of the application are stated in encl 17 as follows:

(a) on 3 December 2024, the plaintiff initiated and filed a writ and statement of claim against the defendant in the High Court of Georgetown, Penang (this honorable court), where it was stated by the

A defendant that this case *should not be heard in Malaysia*;

(b) this honorable court *does not have jurisdiction* to hear this civil lawsuit; and

B (c) the terms of the alleged agreement entered between the plaintiff and the defendant are *governed by the laws of the United States and/or the state laws of New York and the parties had* submitted exclusively to the jurisdiction of United States and/or its' state law New York.

C **[15]** It is noted that the heading of encl 17 referenced O 12 r 10(2) of the Rules of Court 2012 ('r 10(2)'). But the relief that is provided under r 10(2) is for a stay of proceedings. It reads:

> (2) A defendant who wishes to contend that the Court *should not assume jurisdiction* over the action on the ground that Malaysia is *not the proper forum* for the dispute
D shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to *stay the proceedings.*

[16] Whereas the relief sought by D, ie setting aside of the action, is provided under O 12 r 10(1) of the Rules of Court 2012 ('r 10(1)'). It reads:
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> 10 Dispute as to jurisdiction (O 12 r 10)
>
> (1) A defendant who intends to *dispute the jurisdiction of the Court* in the proceedings by reason of any irregularity as is mentioned in rule 9 or *on any other ground* shall enter an appearance and, within the time limited for serving a defence,
F apply to the Court for —
>
> (a) an order *setting aside* the writ or service of the writ on him;
>
> (b) an order declaring that the writ has not been duly served on him;
>
> G (c) the discharge of any order giving leave to serve a notice of the writ on him out of the jurisdiction;
>
> (d) the discharge of any order extending the validity of the writ for the purpose of service;
>
> H (e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;
>
> (f) the discharge of any order made to prevent any dealing with any property of the defendant;
>
> I (g) a declaration that in the *circumstances of the case* the Court has *no jurisdiction* over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; or
>
> (h) such other relief as may be appropriate.

[17] During the hearing, the counsel for D clarified that the reference to

r 10(2) in the heading of encl 17 is a typographical mistake. The correct reference should be r 10(1). The counsel for P accepted that there is no confusion regarding the reliefs which are sought by D. As highlighted above, the prayers in encl 17 are to set aside the instant suit.

[18] This is reinforced in para 4 of D's affidavit in support affirmed on 15 January 2025 (encl 18), which states:

> 4. After obtaining advice from legal practitioners, I filed this Application and understand that if there is a *dispute about jurisdiction,* an *application to set aside* the writ or for service of the writ on the defendant must be made to the Court within the limited time for filing a defence.

WHETHER THIS COURT HAS JURISDICTION

[19] D contends that this court does not have jurisdiction to hear the instant suit. I disagree. D is a Malaysian citizen and resident in Penang, Malaysia. As such, I have jurisdiction by virtue of s 23(1) of the Courts of Judicature Act 1964.

[20] Section 23(1) of the Courts of Judicature Act 1964 reads:

> 23(1) Subject to the limitations contained in article 128 of the Constitution every High Court *shall have jurisdiction* to try all civil proceedings where:
>
> (a) the cause of action arose; or
>
> (b) the *defendant* or one of several defendants *resides* or has his place of business; or
>
> (c) the facts on which the proceedings are based exist or alleged to have occurred; or
>
> (d) any land the ownership of which is disputed, *within the local jurisdiction* of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[21] It is sufficient for a plaintiff to show that its action falls within any one of the conditions set out in s 23(1) of the Courts of Judicature Act 1964. This was articulated by the Court of Appeal in *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424 at p 432; [2004] 1 CLJ 810 at p 817, which held:

> In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:
>
> (a) where the defendant is served with the writ or other originating process within the jurisdiction; or

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(b) where *any of the conditions set out in s 23 of the Courts of Judicature Act 1964 are satisfied*; or

(c) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to RHC O 11.

B

[22] It is my finding that this court is seized with jurisdiction to hear P's claim against D, as it falls within the scope of s 23(1) of the Courts of Judicature Act 1964. Specifically, P's action falls within the ambit of s 23(1)(b) thereof. To wit, D is a Malaysian resident and domiciled in Malaysia. Accordingly on this ground alone, this court is seized with jurisdiction.

C

WHETHER THIS COURT SHOULD EXERCISE OR ASSUME JURISDICTION

D

[23] Nevertheless, a separate consideration is whether this court should exercise or assume jurisdiction over the matter. My answer is in the negative, due to the exclusive jurisdiction cl 32.

[24] I am cognisant that the exclusive jurisdiction cl 32 does not necessarily oust the jurisdiction of this court. Nevertheless, I am obliged to give effect to a forum selection clause. Otherwise, I would be condoning a breach of contract on the part of a plaintiff who disregards such a clause.

E

F

[25] I rely on the Court of Appeal decision in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394 at p 402; [2019] 1 CLJ 381 at pp 388–389, which held:

> [19] In the present appeal, just like the American Express case, the parties here had *agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA.* Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. *Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed* (see *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154; [1976] 1 LNS 31). *Disregarding such a clause would effectively mean the courts condoning a breach of the agreement*.

G

H

[26] Here, it is undisputed that the agreement between the parties contains a forum selection clause. Pursuant to the exclusive jurisdiction cl 32, the parties had agreed that any and all disputes shall be adjudicated in the state of New York, US. Further, that their rights and obligations under the agreement shall be governed by and interpreted and determined in accordance with the laws of the state of New York, US.

I

[27] Under such circumstances, the burden of proof is on P to show exceptional circumstances amounting to strong cause warranting a

displacement of the exclusive jurisdiction cl 32. On this aspect, I again rely on the Court of Appeal decision in *World Triathlon*, which held (at p 402 (MLJ); and p 389 (CLJ)):

> [21] So, to surmise, *where there is an exclusive jurisdiction clause, effect should be given to it* and a stay ought to be granted, *unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal.* The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.

[28] In similar vein, the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154 at p 155 said:

> As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The Fehmarn* [1957] 2 All ER 707 Wilmer J said at p 710:
>
> > Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case.

[29] P has not demonstrated exceptional circumstances amounting to a strong cause to justify why it should not be bound to honour the exclusive jurisdiction cl 32, which it had agreed to. Indeed, on the facts of the case, I am satisfied that the New York, US court is the more appropriate forum (as will be elaborated later).

[30] P relies on the Federal Court decision in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189. In that case, the respondents had obtained leave to serve proceedings out of the jurisdiction on the appellants in relation to a dispute arising from a joint venture agreement and a performance guarantee. The appellants applied to set aside the service of the writ and to stay proceedings. This is on the basis that the performance guarantee was governed by the laws of Sudan and contained a non-exclusive jurisdiction clause in favour of the Sudanese courts. The application was dismissed at the High Court, which was upheld by both the Court of Appeal and the Federal Court.

[31] But that case is distinguishable, as the forum selection clause there was non-exclusive. This is recognised in the judgment of the Federal Court, which states (at p 204):

> [23] ... More importantly the first and second defendant's agreement to submit to the jurisdiction of the Sudan courts was non-exclusive.

A FORUM CONVENIENCE

[32] It is noteworthy that the last part of the exclusive jurisdiction cl 32 explicitly provides that neither party should raise the defence of forum non conveniens. It states that each party waives any objection with respect to the laying of venue of or defence of convenience of forum with respect to the New York, US courts. This seems to suggest P had envisaged that the argument of forum non conveniens might be raised in the future if any dispute arises. And had in the agreement itself decided to waive any such possible objection. As such, I consider that P is estopped from raising such argument.

[33] Be that as it may, I find that it is the New York, US court which has the most real and substantial connection to P's action. My reasons are these:

(a) regardless of which cause of action is relied upon by P (fraudulent misrepresentation, constructive trust, unjust enrichment or breach of contract), the dispute essentially revolves around the FTX claims. And the FTX is situated in the US;

(b) the issues and facts in dispute relating to the FTX claims, relevant verifications (of documents and facts), potential witnesses, individuals, entities (such as the liquidators, FTX and other governmental departments), applicable statutes and laws and evidence, are closely connected to New York, US;

(c) it would be more effective to interpret the applicable laws, the verification of validity and the discovery of facts in the courts of New York, US;

(d) the FTX claims are still pending determination by the US bankruptcy court for the District of Delaware;

(e) P's claim of fraudulent misrepresentation is premised on information obtained from an entity supposedly associated with FTX. Namely Alvarez and Marshal North America LLC, who appears to be a LLC entity from the USA;

(f) D also bears the evidential burden of proof for his defence, and must present his own witnesses and supporting documents to substantiate his defence.
(This is premised on Malaysian law — see ss 101 to 103 of the Evidence Act 1950. I cannot speak to New York, US law, which is the governing law in this instance); and

(g) the relevant documents, or at least those which were produced in affidavit evidence thus far, largely originate from the US and are not Malaysian documents. They include the following:

(i) US bankruptcy court — proof of claim (Form 410);

(ii) US bankruptcy court — transfer of claim other than for security — local Form 138;

(iii) FTX noticing (Kroll Restructuring Administration LLC);

(iv) recovery KYC process (claims.ftx.com);

(v) US bankruptcy court — motion of debtors to estimate claims based on digital asset;

(vi) US bankruptcy court — order granting motion of debtors;

(vii) US bankruptcy court — notice of filing of consolidated lists;

(viii) price confirmation from 507 Capital LLC;

(ix) US bankruptcy court — notice of interim fee application (applicant Alvarez & Marshal North America, LLC); and

(x) US bankruptcy court — certificate of Edgar W Moslev II.

[34] On the question of whether or not the court should exercise jurisdiction in cases where the parties have agreed to refer any disputes to a foreign court, the Federal Court in *Globus Shipping* at pp 155–156 cited the following passage from the English case of *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641 at p 645:

> The principles established by the authorities can, I think, be summarised as follows:
>
> (1) Where plaintiffs sue in England in *breach of an agreement to refer disputes to a foreign court*, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not
>
> (2) The discretion should be exercised by granting a stay *unless strong cause for not doing so is shown*.
>
> (3) The *burden of proving such strong cause is on the plaintiffs*.
>
> (4) In exercising its discretion the court should take into account all the circumstances of the particular case.
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded:
>
> (a) *In what country the evidence on the issues of fact is situated, or more readily available*, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
>
> (b) Whether the *law of the foreign court applies* and, if so, *whether it differs from English law* in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

(See also *Halsbury's Laws of England*, 4th Ed, Volume I, p 281, para 440).

[35] In the Supreme Court case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, the appellant (Singaporean bank) and their customers (the respondents), had entered into agreements for the former to assist the latter in their foreign exchange transactions. These agreements contained jurisdiction and choice of law clauses in favour of the Singapore courts and Singapore law respectively. The respondents had obtained leave to serve proceedings out of jurisdiction on the appellant for fraudulent breach of fiduciary duty for providing false and misleading information. The appellant's application to discharge the order granting leave and to set aside the writ was dismissed by the High Court.

[36] The Supreme Court allowed the appellant's appeal and set aside the writ. The Supreme Court remarked that the fundamental principle in regard to the doctrine of forum non conveniens is that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. Further, that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction, and not one of convenience.

[37] The Supreme Court observed that there are a variety of factors which ought to be considered in applying the doctrine of forum non conveniens. A prominent one being whether any particular forum is one with which the action has the most real and substantial connection. The Supreme Court noted that the existence of a foreign jurisdiction clause is a glaring factor. Such a clause would, in some significant way, militate against the Malaysian court being a suitable forum.

[38] The Supreme Court said (at p 168):

> We considered the relevant factors in this instant appeal. *A very glaring factor in the instant appeal was the foreign jurisdiction clauses* in both the said agreements as set out above by which the bank customers had chosen Singapore courts for the litigation, ie expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore courts; and further, both parties had chosen Singapore law as

the law of their choice for the litigation, prospective or otherwise. A

It would be clear that, notwithstanding such clauses, a Malaysian court, ie High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not ... That said, *such clauses would in any event, in some significant way, militate against any argument for the bank's customers, ie the plaintiffs, that the Malaysian court was the most appropriate forum*. B

[39] It bears reiterating that in the present case, the parties had submitted to the jurisdiction of the chosen New York, US courts. And had further chosen New York, US law as their law of choice. On top of that, the parties had expressly waived the defence of convenience of forum with respect to the New York, US courts. In light thereof, I refer to the following authorities which emphasised the importance of a forum selection clause in determining forum convenience. C D

[40] In *Open Country Dairy Ltd v Able Food Sdn Bhd* [2021] MLJU 969; [2021] 7 CLJ 716, the Court of Appeal overturned the decision of the court below. Which had held that the High Court of Malaya was the appropriate forum, notwithstanding the existence of a foreign jurisdiction clause. The High Court had made these findings (at p 732 (CLJ)): E

[55] ...

[95] ... I hold that the High Court of Malaya is the particular forum with which the action has the most real and substantial connection: F

(i) the contract was made in Malaysia;

(ii) the breach occurred in Malaysia;

(iii) Both New Zealand and Malaysia have a system of law with its foundation in the English common law system, inherited from being a part of the Commonwealth and case laws made by decisions of the courts; there will be no earthshaking or material differences in the law system as such applicable to the sale of goods and contract law. G

[41] Nevertheless, the Court of Appeal found no grounds to disregard a contractually agreed exclusive jurisdiction clause. The Court of Appeal said (at p 737): H

[79] ... there was an *exclusive jurisdiction clause* ... Therefore, the respondent *must be held to their bargain* and a *Malaysian court is obliged to give effect to the exclusive jurisdiction clause*, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish that there are *exceptional circumstances to justify the contrary* (see: *World Triathlon*). I

[80] Having carefully examined the record of appeal, we *did not find any convincing evidence that would qualify as exceptional circumstances to justify not giving effect to the*

exclusive jurisdiction clause. Of course, from the perspective of the respondent, it would be quite unfair for the action to be filed in the New Zealand courts as they had paid a substantial sum to the appellant and would have to incur further costs in having to file and prosecute their action in New Zealand.

[81] But then again, *those were the terms upon which they had contracted* with the appellant when they agreed to purchase the latter's goods. *Whatever the inconvenience that the respondent may be put to is purely a consequence of their agreement.* The respondent's complaint in having to file the action in New Zealand is a complaint that can cut both ways. The appellant can easily mount a like counter argument particularly when it is clear that the action ought to have been filed in New Zealand in accordance with cl 19.2 of the terms of trade.

[42] In *World Triathlon*, the Court of Appeal found that the court below was wrong to have overridden the exclusive jurisdiction clause. The Court of Appeal said (at p 403 (MLJ); p 390 (CLJ)):

[22] Now, although the learned *judge had appreciated the correct principles when he held that 'the burden is on the plaintiff to show a strong case to override the agreement in the forum selection clause'*, the learned *judge, however, had erred in his finding that the respondent had discharged this burden*. In the judgment, the learned judge found:

> [13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants fees, the fraud and conspiracy by one of the plaintiff's director are all in Malaysia. This includes Dato' Sri Ram who liaised with defendant vide email to explain the defaults complained by the defendant. Certainly, the plaintiff will have a bear substantial expense and inconvenience to bring all these witnesses to Florida, United States.
>
> [14] The plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the event license agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.
>
> [15] Therefore the evidence on issues of fact is situated or more readily available in Malaysia.
>
> [16] In the circumstances, I find that the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia.

[23] In our view, these considerations accepted by the learned judge are *insufficient to override the exclusive jurisdiction clause*. *More is required* as the *parties had willingly and contractually agreed to the exclusive jurisdiction clause* as well as the laws of Florida/USA as the law of choice for the litigation. The respondent *must show more than just inconvenience to witnesses and cost of litigation*. Practical inconvenience is not a determinative factor. *What matters most is the suitability of the forum which will meet the ends of justice*.

THE LAW AND LEGAL REQUIREMENTS OF NEW YORK, US

[43] In the present case, the parties had chosen New York, US law as their choice of law for litigation. P argues that issues of foreign law are merely issues of fact which can be established through expert evidence (see s 45(1) of the Evidence Act 1950). Further, that foreign law may be proved by reference to law books (see s 38 of the Evidence Act 1950). Even so, I do not consider it efficient for a judge in Malaysia to have to be educated on New York, US law in order to be able to try this action.

[44] From the provisions contained in the agreement, I consider that the subject-matter of this action is closely tied to US law and legal requirements. The salient provisions of the agreement are reproduced below:

(a) Section 3 (a) of the agreement

a. the claims (including as defined in 11 U.S.C. § 101(5), "Claims") and any rights to recover property (collectively, the "Transferred Claims"), in each case:

(i) as described in the proof of claim (the "Proof of Claim") referenced as Claim No. 1080, filed by Seller against FTX Trading Limited or any of its affiliates that are debtors (collectively referred to as the "Chapter 11 Debtors") in the case captioned *In re FTX Trading Ltd*, Case Number 22-11068 (JTD) (the "Case"), pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court");

(ii) relating to, arising as a result of, or derived from any Claims held by Seller against Chapter 11 Debtors' affiliates (collectively with the Chapter 11 Debtors, the "Debtors") that are not debtors in the Case;

(iii) relating to, arising as a result of, or derived from the provisional liquidation proceedings initiated for FTX Digital Markets Ltd. in November 10, 2022 by order of the Supreme Court of the Bahamas (the "Bahamas Provisional Liquidation"), as well as any other ongoing or future legal proceedings, foreign or domestic, relating to the Debtors, their affiliates or any third party (the "Proceedings"), or

(iv) relating to, arising as a result of, or derived from suits, causes of action, and any other right of Seller against any of the Chapter 11 Debtors, their respective affiliates, any guarantor, agents, principals, managers, managing members, members, stockholders, controlling persons, directors, officers, employees (current or past, including, without limitation, Sam Bankman-Fried, Gary Wang, Nishad Singh and Caroline Ellison), attorneys, professionals and other advisors, or any other third party relating to or arising from or in connection with the Claims or the rights to recover property described in Sections 3.a.(i), 3.a.(ii), or 3.a.(iii) herein, together with all voting and other rights, property and benefits which may be paid, refunded or reclaimed with respect to such Claims or rights to recover property, including, without limitation, Seller's rights in any collateral relating to or securing such Claims or rights to recover property and held, delivered or pledged at any time under or relating to the foregoing.

A

(b) Section 17 of the agreement

17. As soon as reasonably practicable following execution of this Agreement, Buyer will establish and maintain a combined deposit account and securities account (and any required subaccounts thereof) held in Buyer's name, located in a Uniform Commercial Code jurisdiction or any other jurisdiction determined by Buyer in its discretion, subject to the control of Buyer within the meaning of the New York UCC Section 8-106 and 9-104 (the "Buyer Account"), for the deposit of and/or credit to all cash, securities, instruments, cryptocurrencies, digital assets, tokens, and/or other property, constituting Collateral (as defined below). When Buyer establishes the Buyer Account, it will provide such account details to Seller in order for Seller to satisfy its obligations hereunder to deposit all Distributions into the Buyer Account. If in any circumstance, Distributions are deposited into an account controlled by Seller, such deposit will be subject to the security interest created pursuant to Section 22 below.

B

C

General Provisions

26. EACH OF THE PARTIES HERETO HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY, UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS AGREEMENT OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH OR IN RESPECT OF ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN) OR ACTION OF ANY PARTY OR ARISING OUT OF ANY EXERCISE BY ANY PARTY OF ITS RESPECTIVE RIGHTS UNDER THIS AGREEMENT OR IN ANY WAY RELATING TO THE TRANSACTIONS CONTEMPLATED HEREBY (INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO ANY ACTION TO RESCIND OR CANCEL THIS AGREEMENT AND WITH RESPECT TO ANY CLAIM OR DEFENSE ASSERTING THAT THIS AGREEMENT WAS FRAUDULENTLY INDUCED OR IS OTHERWISE VOID OR VOIDABLE). THIS WAIVER OF RIGHT TO TRIAL BY JURY IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EACH OF THE PARTIES HERETO IS HEREBY AUTHORIZED TO FILE A COPY OF THIS SECTION 26 IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER. THIS WAIVER OF JURY TRIAL IS A MATERIAL INDUCEMENT FOR THE PARTIES HERETO TO ENTER INTO THIS AGREEMENT.

D

E

F

(d) Section 27 of the agreement

(as listed in Schedule I hereto) to any entity, except that any party may make any such disclosure (a) if required to do so by any law, court, or regulation, (b) to any banking, regulatory, or examining authority, (c) if its attorneys advise it that it has a legal obligation to do so or that failure to do so may result in it incurring a liability to any other entity, or (d) to its professional advisors and auditors. Notwithstanding the foregoing, Buyer may disclose the contents of this Agreement (but not the Purchase Price) to any proposed transferee, assignee, participant, or other entity proposing to enter into contractual relations with Buyer in respect of the Transferred Rights. This Agreement is personal to Buyer and does not constitute an offer to any other person or the public generally to subscribe for or otherwise acquire the Transferred Rights. Solely for purposes of this Section 27, "person" shall not include any fund that is a "qualified institutional buyer" (a "QIB") (as defined in Rule 144A of the United States Securities Act of 1933, as amended (the "Securities Act")) which is managed or controlled by Buyer, for which Buyer acts as the investment advisor or which is directly or indirectly managed or controlled by the same entity as Buyer (a "Qualified Affiliated Fund").

G

H

I THE PLAINTIFF'S CAUSE OF ACTION

[45] P argues that its cause of action against D is based on fraudulent misrepresentation, constructive trust and unjust enrichment. It is not merely related to the agreement, but more towards how D had allegedly induced P into

the agreement. Nevertheless, I consider that regardless of whether P's claim is for fraudulent misrepresentation, constructive trust or unjust enrichment, the crux of the matter is the FTX claims purchased by P from D pursuant to the agreement. The dispute is over P's allegation that the FTX claims do not belong to D. Thus, it cannot be denied that the dispute arises from the agreement.

[46] Further, P did plead breach of contract as a cause of action. In para 76 of the statement of claim, P's action for breach of the agreement is premised on particulars of alleged fraudulent misrepresentation. It appears that P's action for fraudulent misrepresentation is inextricably linked to its action for breach of the agreement.

[47] Paragraph 76 of the statement of claim is reproduced below.

> 76. In failing, refusing and/or neglecting to sell, transfer and/or assign to the Plaintiff the alleged rights, title and interest in, to and under the Alleged FTX Claims and Rights, the Defendant had *breached the terms of the Agreement.* The particulars of breach are as follows:
>
> Particulars of Breach
>
> 76.1 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that the Defendant was the sole legal and/or beneficial owner of the Alleged FTX Claims and Rights in that the Defendant had good and marketable title to sell, transfer and/or assign to the Plaintiff the alleged rights, title and interest in, to and under the Alleged FTX Claims and Rights to the Plaintiff.
>
> 76.2 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that upon transfer of the Alleged FTX Claims and Rights, the Plaintiff shall be deemed to be the owner of the Alleged FTX Claims and Rights and shall be entitled to identify itself as the owner of the Alleged FTX Claims and Rights.
>
> 76.3 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that the Defendant had the requisite power and authority to execute, deliver and perform the Agreement and all transactions contemplated under the Agreement to become effective.
>
> 76.4 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that no portion of the Alleged FTX Claims and Rights had been sold, assigned or pledged to any third party by the Defendant in whole or in part.
>
> 76.5 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that the Defendant is on good standing and is duly authorised and empowered to execute, deliver and perform the Agreement.
>
> 76.6 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that all information and /or documents

provided in connection with the Alleged FTX Claims and Rights was complete, true and correct in that there are no other documents, agreements, stipulations or orders that have not been provided, whether requested or not by the Plaintiff.

76.7 In *breach of the Agreement,* the Defendant had *misrepresented* to the Plaintiff (either directly or via the Plaintiff's Agent) that the Alleged FTX Claims and Rights are valid and enforceable.

[48] In para 77 of the statement of claim, P relied on various provisions of the agreement. Thus, the court trying this action would have to determine such provisions of an agreement that is governed by New York, US law.

[49] Paragraph 77 of the statement of claim is reproduced below.

77. Pursuant to the *terms of the Agreement,* the Defendant had agreed, among others, to the following terms:

77.1 In the event that the Defendant fails to perform his obligations under the Agreement, or otherwise materially breaches any representation or covenant under the Agreement, then, and in every such event, and at any time thereafter during the continuance of such event any and all Secured Obligations (as defined in paragraph 28.9 above) shall become immediately due and payable to the Plaintiff without presentment or demand or any notice to the Defendant.

[Section 24 of the agreement]

77.2 The Defendant agrees to indemnify, defend and hold the Plaintiff harmless from and against any and all expenses, losses, loss of profit, Claims (as defined in paragraph 22(a) above), damages, suits, proceedings, objections and Losses result from, or arise out of, among others: (i) any impairment of the Alleged FTX Claims and Rights; (ii) or agreements contained in the Agreement; and (iii) any litigation or other proceedings between the rights with respect to the Alleged FTX Claims and Rights or the Agreement.

[Section 34 of the agreement]

77.3 The Defendant acknowledges and unconditionally agrees that any misrepresentation or breach by the Defendant may cause the Plaintiff irreparable harm and, accordingly, the Plaintiff shall be entitled to all available remedies against the Defendant for any such misrepresentation, breach or threatened breach, including, without limitation, the immediate recovery of money damages including, without limitation, a restitution payment.

[50] In the circumstances, I am satisfied that there exists some other court of competent jurisdiction which is more appropriate than the Malaysian court to hear this action. Namely, the courts of New York, US. That is the more suitable forum which will meets the ends of justice.

THE RELIEF OF SETTING ASIDE THE ACTION

[51] I turn now to the question of what is the appropriate relief in the present case. To recap, my finding is that I should not exercise or assume jurisdiction over the instant suit due to the exclusive jurisdiction cl 32. And also because I consider that there is another more suitable forum ie New York, US court.

[52] Interestingly, the words 'should not assume jurisdiction' appear in r 10(2). Which is premised 'on the ground that Malaysia is not the proper forum for the dispute'. The relief that is specified in r 10(2) is for a stay of the proceedings. Thus, if D had applied for a stay of the present action, there would be no controversy that I can grant the same pursuant to r 10(2). However, D has applied to set aside the action pursuant to r 10(1).

[53] Rule 10(1) applies where 'a defendant intends to dispute the jurisdiction of the court ... on any other ground'. Here, D is indeed disputing the jurisdiction of the Malaysian court based on two grounds. Firstly, D states that this court 'does not have jurisdiction to hear this civil lawsuit'. Alternatively, D states that 'this case should not be heard in Malaysia'.

[54] As mentioned earlier, I disagree with D on the first ground and find that the Malaysian court has jurisdiction by virtue of s 23(1) of the Courts of Judicature Act 1964. Nevertheless, I agree with D on the alternative ground ie that this case should not be heard in Malaysia. As explained above, my reasons are two-fold. First, because of the exclusive jurisdiction cl 32. Second, because of forum non conveniens.

[55] It seems to me that those reasons can come within the ambit of r 10(1), where the jurisdiction of the Malaysian court is disputed 'on any other ground'. I do not see why the relief of setting aside under r 10(1) cannot be granted in the present case. Notwithstanding that the words 'should not assume jurisdiction ... on the ground that Malaysia is not the proper forum for the dispute' does not explicitly appear in r 10(1).

[56] On principle, I can think of no reason why I should be precluded from granting an order to set aside the action. If need be, I fall back on the inherent jurisdiction of the court, as prayed for in prayer (3) of encl 17. I am fortified in my view by O 12 r 10(4) of the Rules of Court 2012, which reads:

> Upon the hearing of an application under paragraph (1) or (2), *the Court may make such order as it thinks fit* ...

[57] In this regard, the Supreme Court decision in *American Express Bank* is instructive. There, the appellant (Singaporean bank) filed an application to set

aside the writ. The application was dismissed by the High Court. On appeal, the Supreme Court allowed the appeal and set aside the writ on the point of forum non conveniens.

[58] The Supreme Court said (at p 164–166):

> Two points clearly emerge as issues in this matter, viz, first, whether our High Court had jurisdiction to hear the action thus filed, and secondly *whether our High Court was or was not a forum non conveniens* ...
>
> We are in agreement with the view of the learned judge about the point of jurisdiction. *We parted company only with the learned judge on the point of forum non conveniens*.
>
> To continue with our view, it is most important to bear in mind another vital principle, that, even if there is such jurisdiction to deal with the case, at common law, a Malaysian court has *still the discretion to decide whether to deal with it on the doctrine of forum non conveniens*. If the court *exercises its discretion accordingly, eg not to deal with the case*, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to *set aside* such leave when leave has already been granted in the absence of the foreign defendant in an ex parte application for such leave earlier.

[59] Here, I have decided not to exercise or assume jurisdiction over the present case due to the exclusive jurisdiction cl 32 and because of forum non conveniens. Having exercised my discretion to not deal with the instant suit, it should be open to me to set aside the action.

[60] Also instructive is the Court of Appeal decision in Open Country. There, the appellant filed a notice of application in the following terms:

> pursuant to Order 12 rule 10(1) and/or (2) ROC and/or the inherent jurisdiction of the court, to (1) set aside the notice of writ to be served out of jurisdiction dated 23 December 2019, and (2) that the courts in Malaysia should not assume jurisdiction over this dispute as parties had submitted to the exclusive jurisdiction of the courts in New Zealand.

[61] The application was dismissed by the High Court. On appeal, the Court of Appeal allowed the appellant's appeal and set aside the decision of the High Court. In doing so, the Court of Appeal:

> ordered that the action in the High Court be stayed per prayer (5) of encl 19.

[62] Two things may be noted about Open Country. First, the notice of application there was filed under the alternative grounds of r 10(1), r 10(2) and/or the inherent jurisdiction of the court. Second, there was a specific prayer for stay of proceedings, as per prayer (5) thereof.

[63] In contrast, encl 17 is made under r 10(1) and the inherent jurisdiction of the court. And not under r 10(2), as clarified by the counsel for D and accepted by the counsel for P. In addition, the prayers in encl 17 are for setting aside of the action, and not for a stay of proceedings. In the circumstances, I consider that the appropriate relief in the present case is to set aside the instant suit.

PRELIMINARY OBJECTION BY THE PLAINTIFF

[64] Before ending, I will address the preliminary objection raised by P towards encl 17. P contends that encl 17 was filed out of the prescribed time, as the time for filing statement of defence has expired. I disagree.

[65] The following chronology of events is useful.

Date	Event
3 December 2024	(a) P filed the writ and statement of claim in the instant suit. (b) simultaneously with the writ and statement of claim, P filed encl 3 to seek for certain injunctive reliefs.
4 December 2024	(a) the cause papers were served on D (b) encl 3 was heard by me. (c) I granted an ad interim order to restrain D from dealing with the 3,322,002.92 USDT tokens in D's wallet No: 0x8008F6448A4eb2A78397Bd67D3c5023Ce983f112 pending the disposal of encl 3 ('ad interim order'). (d) D was given 14 days to file his affidavit in opposition to encl 3, ie by 18 December 2024.
16 December 2024	(a) D wrote to the court to request an extension of time to file his defence by 16 January 2025, citing his need to 'focus on the Injunction Application first, considering its urgency'. (NB: Otherwise, the deadline for D to file and serve his defence was on 2 January 2025) (b) in the absence of any objection from P, the extension of time was granted.
15 January 2025	D filed encl 17.

[66] Firstly, I think it is quite understandable for D to request an extension of time to file defence, given the urgency and time constraints of having to deal with encl 3. By no means would I regard this as an abandonment of D's right to dispute the jurisdiction of the Malaysian court. Otherwise, judgment in default of defence could be entered against D. Pertinently, D had expressly reserved his right to file any objection or interlocutory application.

[67] On this aspect, I share the sentiment expressed by the Court of Appeal in *Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd* [2024] 2 MLJ 471; [2024] 3 MLRA 152; [2024] 4 CLJ 243, albeit in the context of whether the defendant in that case had abandoned arbitration in favour of litigation in the courts. The Court of Appeal said (at pp 475–477 and 487 (MLJ); pp 247–249 and 259 (CLJ)):

> [1] It has become an almost reflexive action when appearing for the first case management date by way of e-review for the counsel for a defendant to invariably ask for an *extension of time to file defence*, especially when the statement of claim has just been served and when it runs into many paragraphs.
>
> [3] Little did the defendant's counsel know that such a request would result in the plaintiff vigorously resisting a subsequent application to stay the court proceedings under s 10(1) of the Arbitration Act 2005 ('the AA 2005') ('stay application') with the argument being advanced that the defendant had clearly and unequivocally elected to abandon arbitration in favour of litigation before the High Court Here, no defence was filed, for as soon as the contract documents were made available by the defendant to its solicitors, its solicitors promptly filed the stay application.
>
> [10] What is less clear is *whether a request for an extension of time to file defence ('the request') is also indicating an unequivocal intention to abandon the arbitration agreement and instead, proceed with litigation*. Has the defendant, by so asking, waived its right to arbitration? It would appear that such a determination would invariably be fact-centric and fact-sensitive.
>
> [51] The Federal Court had explained that entering an appearance is a necessary step to be taken even if the defendant wants to apply for a stay application for, otherwise, a judgment in default of appearance may be entered against it. As for the service of pleadings by the defendant, that would be a clear step in the proceedings.
>
> [52] The Federal Court, in giving the above guidance, was fully conscious of the fact that there may well be cases where there had been a *request for extension of time to file defence, but that no defence was ever filed*. Such a request may be made orally at the date of the first case management or by way of a written letter to the plaintiff's solicitors, or by way of a formal application for extension of time to file defence.
>
> [53] With the greatest of respect, it would be *too simplistic and, indeed, too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file defence would ipso facto tantamount to 'taking any steps in the proceedings'*.

[68] Secondly, it is my finding that encl 17 was filed 'within the time limited for serving a defence', in compliance with O 12 r 10(1)(a). Enclosure 17 was filed on 15 January 2025. Which is before the due date for filing of defence on 16 January 2025. The crucial point here is that the statement of defence has not been filed when encl 17 was taken out. Otherwise, the filing of defence could be regarded as submission to jurisdiction (see the Federal Court decision in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625).

[69] P complains that D did not apply for an extension of time to file his

jurisdictional challenge via Enclosure 17. D had only obtained an extension of time to file defence. On this point, P cited the High Court decision in *Teng Ah Kiong v Lam Chee Seong* [2024] MLJU 1366; [2024] CLJU 1326. With respect, I do not think D needs to separately obtain an extension of time to file encl 17. It is sufficient that he had obtained an extension of time until 16 January 2025 to file defence. The 'time limited for serving a defence' under O 12 r 10(1)(a), in my view, can mean such extended time.

[70] I say this because extension of time is a concept that is entrenched in the Rules of Court 2012 (see O 3 r 5 of the Rules of Court 2012). In relation to judgment in default of defence, such judgment may only be entered 'after the expiration of the period fixed under these Rules for service of the defence.' (see O 19 of the Rules of Court 2012). The period for service of defence is always subject to 'the court giving leave to the contrary.' (see O 18 r 2 of the Rules of Court 2012).

ENCLOSURE 3

[71] Via encl 3, P seeks the following injunctive reliefs and ancillary disclosure orders against D pending the disposal of this action:

(a) a proprietary injunction restraining D 'from transferring, disposing of, and/or in any way dealing with the 3,322,002.92 USDT tokens paid in D's wallet address No: 0x8008F6448A4eb2A78397Bd67D3c 5023Ce983f112 ('P's USDT tokens') and/or its traceable proceeds, being any property (whether real or personal property) and/or assets acquired directly or indirectly, partially or fully, with P's USDT tokens ('traceable proceeds')';

(b) where the traceable proceeds are monies in a bank account, D shall pay the same into court;

(c) D shall file an affidavit providing full, complete, and accurate accounts of P's USDT tokens and the traceable proceeds;

(d) a Mareva freezing injunction pursuant to the terms set out in Annexure A of encl 3; and

(e) an ancillary disclosure order requiring D to inform P of all his assets, whether in or outside Malaysia and whether solely or jointly, giving the value, location, and details of all such assets.

[72] The setting aside of this action puts it to an end. Under such circumstances, the ad interim order dated 4 December 2024, which has to be ancillary to a substantive action, can no longer continue. As such, I set aside the ad interim order and dismissed encl 3.

A CONCLUSION

[73] For the reasons above, I allowed D's application to set aside P's action vide encl 17. I ordered P to pay costs in the sum RM5,000 for encl 17 and RM5,000 for encl 3 to D.

B

Enclosure 17 allowed; and plaintiff's action set aside.

Reported by Ashok Kumar

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